IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 148 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BABUBHAI AMBALAL PATEL - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR HRIDAY BUCH for Applicant(s) : 1,
MR.A.J. DESAI, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
MR RAVINDRA SHAH for Respondent(s) : 2,
MRS KANAN R SHAH for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 05/09/2006

ORAL JUDGMENT

Babubhai Ambalal Patel, the petitioner-original accused in Special Criminal Case No.3625 of 1998 before the learned Joint Civil Judge (JD) & JMFC, Surat, is before this Court praying that,

> “Your Lordship be pleased to admit the present revision application and after calling for the records and proceedings from the court of the learned JMFC, Surat be pleased to quash and set aside the judgement and order of conviction passed by the learned Addl. Sessions Judge, Surat in Criminal Appeal No.40 of 2002 and judgement and order of conviction passed by the learned JMFC, Surat in Criminal Case No.355 of 2002, original No.Criminal Case No.3625 of 1998.”

The learned Joint Civil Judge (JD) & JMFC, Surat by judgement and order dated 06.08.2003 was pleased to convict the petitioner for the offence punishable under section 138 of the Negotiable Instruments Act and was pleased to sentence him for two years simple imprisonment, fine of Rs.5000/-, and in default, six months simple imprisonment. In addition to that the learned JMFC was pleased to order that the accused shall pay a sum of Rs.65,400/- to the complainant within 30 days.

2. Being aggrieved by the order of the learned JMFC, the present petitioner-original accused preferred Criminal Appeal No.40 of 2003 in the Court of learned Additional Sessions Judge, Surat.

3. The learned Additional Sessions Judge, Surat was

pleased to dismiss the appeal with cost and the order passed by the learned Joint JMFC in Criminal Case No.355 of 2002 dated 6th August 2003 was confirmed.

The learned Additional Sessions Judge was pleased to cancel the bail bond of the petitioner- appellant-original accused and hence he was taken into custody on 02.12.2003.

4. The facts of the present case are that the complainant and the accused were neighbours and they had friendly relations. The accused had started business in the name of and style as 'Maruti Elevators'. The accused had tried to convince the complainant to be a partner in the said business, to which the complainant declined. The accused then asked for a loan and the complainant paid a sum of Rs.65,400/- in the year 1996. On demand by the complainant the accused gave him a cheque dated 23rd September 1998 bearing bearing No.0062278 of Surat Textile Traders Cooperative Bank Limited. The said cheque when presented in the Bank on 24.09.1998, it returned dishonoured with an endorsement, “insufficient funds”.

The complainant served a notice to the accused by

Registered Post AD letter dated 6th October 1998 and also by UPC. The accused replied the said notice on 28.10.1998, but did not pay the amount of cheque. Therefore, a complaint under section 138 of the Negotiable Instruments Act was filed.

Process was served to the accused. He was furnished copies of papers. By exh.5, his 'plea' was recorded wherein he denied to have committed any offence. Hence the case tried. Both the parties led necessary evidence before the Court, whereupon the learned JMFC framed issues and after hearing the parties answered issues no.1 to 5 in affirmative, and issue no.6, 'as per final order'.

5. The learned JMFC recorded conviction and after hearing the accused on the point of sentence, awarded the sentence as aforesaid.

6. The accused being aggrieved of the said judgement and order passed by the learned JMFC preferred an appeal being Criminal Appeal No.40 of 2003. The accused deposited of Rs.25,000/- on 03.09.2003, as per the order passed by the learned Additional Sessions Judge, Surat. The learned Additional Sessions Judge, Surat heard the

appeal on merits and after taking into consideration the rival submissions of both the parties and all other aspects of the matter dismissed the appeal. The order passed by the learned JMFC, Surat in Special Criminal Case No.355 of 2002 was confirmed.

7. The accused preferred the present Criminal Revision Application. This Court by a well considered order dated 30.04.2004 admitted the Criminal Revision Application with a view to enable the parties to come to an amicable settlement. The Court while considering the case of the petitioner-original accused for bail directed the petitioner to deposit the balance amount of Rs.40,400/- before the Sessions Court within three weeks from the date of the order.

It is stated at the Bar that the said amount was deposited before the Sessions Court and after the deposit of the said amount, respondent no.2-original complainant has withdrawn the same.

8. The learned advocate Mr.Hriday Buch for the petitioner emphatically submitted that this is a matter arising out of the conviction under section 138 of the Negotiable Instruments Act. He submitted that by now the

petitioner has already paid the full amount of the cheque to the complainant and therefore, today what survives is the technical offence committed by the petitioner. Besides, he submitted that on 02.12.2003 when the learned Additional Sessions Judge, Surat dismissed the appeal, the 'bail bonds' were cancelled and he was taken into custody. He submitted that he remained in custody till this Court again ordered to release him on bail on 30.04.2004. Thus, he remained in Jail for almost five months, i.e. from 02.12.2003 to 30.04.2004.

Section 138 of the Negotiable Instruments Act, 1881 as stood prior to its amendment on 06.02.2003 reads as under:

> “Dishonour of cheque for insufficiency, etc. of funds in the account -- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank,

such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, **be punished with** imprisonment for a term which may extend to one year or with fine which may extend to twice the amount of the cheque, or with both:" (emphasis supplied)

The learned advocate for the petitioner submitted that section 138 is amended by the Negotiable Instruments (Amendment & Miscellaneous Provisions) Amendment, 2002 (55 of 2002) by section 7 of the Amendment Act, and section 138 is amended with effect from 06.02.2003 and the words, "one year" are substituted with the words, "two years".

That being so the question which falls for consideration is whether 'for offence committed by the petitioner-original accused, the punishment will, 'maximum of one year' as the offence was committed in the year 1998, applying the unamended section 138 will be applicable where the maximum sentence prescribed, 'imprisonment for a term which may extend to one year' or amended section 138 where punishment prescribed is 'two years'. The learned advocate for petitioner submitted that the petitioner has already remained in Jail for five months,

has 'repaid the entire amount' of the cheque, the sentence awarded by the learned JMFC, Surat as confirmed by the learned Additional Sessions Judge, Surat, be modified, and 'sentence undergone' be awarded. The learned advocate for the petitioner submitted that by judgement and order dated 6th August 2003, the learned JMFC could not have awarded 'two years' simple imprisonment to the petitioner in view of the aforesaid legal position.

9. Mr.Shah, the learned advocate for respondent no.2-original complainant submitted that the complainant is having three other complaints pending against the petitioner-original accused, but in those three complaints, the petitioner is not available for trial and he is reported 'absconding'.

10. This Criminal Revision Application was admitted in the year 2004. Since then respondent no.2 has been pursuing his remedy before the appropriate Court. May be with a hope that now that the petitioner is before this Court he will be able to obtain an order even with regard to those other three complaints also. As this Revision Application has nothing to do with those other three complaints/ proceedings. It is for the complainant-respondent no.2 to take appropriate action in those

matters and proceed with them. Only because some other criminal complaints/ proceedings are pending in which the complainant has not taken any effective steps though there was no order against him, the result of this case cannot be adversely affected.

11. Having heard the learned advocate for the petitioner, the learned Additional Public Prosecutor for respondent no.1-State, and the learned advocate for the complainant-respondent no.2, it is deemed fit that the judgement and order passed by the learned JMFC and confirmed by the learned Additional Sessions Judge be modified with regard to the sentence. The sentence awarded of two years is substituted to be, 'the sentence undergone'. Rule is made absolute.

(RAVI R. TRIPATHI, J.)

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